4-8-2009

Pizzuto v. State Respondent's Brief Dckt. 34845

IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALD ROSS PIZZUTO,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 34845

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature Of The Case

Petitioner-Appellant Gerald Ross Pizzuto ("Pizzuto") appeals from the district court's Memorandum Decision and Order Granting State Of Idaho's Motion to Reconsider and "each and every order, memorandum or decision entered against Petitioner in this case by any assigned judge," which stem from the denial of post-conviction relief based upon the claims in his **sixth post-conviction petition**.

Statement Of Facts And Course Of The Underlying Criminal Proceedings And First Post-Conviction Case

The Idaho Supreme Court has detailed the facts leading to Pizzuto's convictions and death sentences for the murders of Berta Herndon and her nephew, Delbert Herndon:

> On July 25, 1985, while camping in the Ruby Meadows area, Berta Louise Herndon and her nephew, Delbert Dean Herndon were murdered and various items of their property were stolen. Gerald R. Pizzuto and his accomplices, James Rice, William Odom and Lene Odom were camping together in a cabin in this same area. Based on testimony given at trial it was determined that on July 25, 1985, William Odom and Pizzuto were planning to rob two fishermen, Stephen Crawford and Jack Roberts, when the Herndons drove by in their pickup truck. However, they abandoned that plan and shortly thereafter Pizzuto left Odom and Rice and walked off in the same direction that the Herndon truck had been headed. At that time Pizzuto stated that he was going "hunting" and walked toward the Herndon cabin, carrying a .22 caliber rifle. Approximately twenty to thirty minutes later Rice and Odom got into their truck and drove up the road looking for Pizzuto. Rice testified that as he and Odom were driving past the Herndon cabin they saw Pizzuto step from the doorway of the cabin holding a holstered pistol. Pizzuto approached the truck and told Rice and Odom to "give me half an hour and then come back up." Rice and Odom drove back to their cabin, parked the truck, and then walked back to the Herndon cabin. As Rice and Odom approached the cabin they heard what Rice described as "bashing hollow sounds" like that of "thumping a watermelon." After these sounds had ceased, Pizzuto walked out of the cabin carrying the .22 caliber rifle and a hammer and handed Odom a "wad of hundred dollar bills." Odom testified that Pizzuto indicated the Herndons had not believed they were being robbed, and that

Pizzuto made Mr. Herndon drop his pants and crawl to the cabin. According to Odom, Pizzuto stated that he "put those people to sleep permanently." Odom also testified that "Pizzuto had told the guy and lady that he was a highwayman and that he was going to rob them and the guy didn't believe him and that Jerry said he stuck the gun up to his face and said, '[d]oes this look like a cannon from where you are standing at?'" Rice testified that he took the rifle from Odom and was about to return to their cabin where he heard a "deep snort and some scuffling" sounds from the Herndon cabin. Rice went inside the cabin and saw Berta Herndon lying on the floor of the cabin with blood on the back of her head. Delbert Herndon was lying on the floor, his "feet were shaking on the floor in rapid succession" and he had blood on his face and the side of his head. Rice shot Delbert Herndon in the head because he "didn't want him to suffer."

The bodies of Berta Herndon and Del Herndon were buried in shallow graves that Rice, Odom and Pizzuto dug near the scene of the murders. After the bodies were buried[,] the money taken from the Herndons was divided between the three men. Shortly thereafter the men packed their belongings and placed them into Odom's pickup truck. They then left Ruby Meadows and headed for McCall, Odom driving his truck and Pizzuto and Rice traveling in the Herndon truck. They camped that evening at a nearby hot springs and the next morning deposited the Herndon truck in a wooded area, drove into Cascade and rented a motel room. Several days later Rice boarded a bus and returned to Orland, California. Upon arriving in Orland, Rice notified law enforcement officials which ultimately lead to the discovery of the bodies.

Gerald R. Pizzuto Jr., James Rice, William Odom, and Lene Odom were charged with murder in connection with the victims' deaths. James Rice and William and Lene Odom all pled guilty to lesser charges or lesser sentence recommendations in return for their cooperation with the state. They all testified against Pizzuto at his trial.

An autopsy was performed on the bodies by Dr. Koenen, a pathologist, who testified at trial that Delbert Herndon's wrists had been bound with a shoe lace and a piece of wire. Although Dr. Koenen stated that Delbert Herndon suffered two fatal blows to the head and a gun shot between the eyes which would also be fatal, he was unable to determine which occurred first. Dr. Koenen testified that the injuries to Delbert Herndon were consistent with a hammer blow to the head. In Dr. Koenen's examination of Berta Herndon's body, he noted that her hand and wrist were tied behind her back using a shoe lace and a ligature which was wrapped several times around her right thumb. Berta Herndon's death was caused by two blows to the back of the head by a blunt object, consistent with hammer blows.

. . . .

> The trial court also admitted evidence that subsequent to the Herndon murders Pizzuto approached Roger Bacon, threatened him with a weapon, told him he was a "highwayman" and that he intended to steal his money and his car. Pizzuto then used Bacon's shoelaces to tie his hands behind his head, interlocking Bacon's fingers and tieing [sic] his two index fingers together. He then gagged Bacon and tied him to a tree. The trial court concluded that the circumstances of the Bacon incident closely paralleled the circumstances of the Herndon murders because Pizzuto had also advised one of the victims that he was a "highwayman" and had tied the victims' hands with shoe laces in a manner similar to the way Bacon's hands had been tied.

State v. Pizzuto, 119 Idaho 742, 748-50, 810 P.2d 680 (1991) (Pizzuto I).

Pizzuto was convicted of two counts of felony-murder, two counts of premeditated murder, robbery and grand theft, and sentenced to death for the Herndons' murders. Id. at 748-50.

On July 3, 1986, Pizzuto filed his first petition for post-conviction relief. (#17534, R., pp.1-2.)[1] An amended petition was filed (#17534, Tr., 2-10-87, pp.4-5),[2] and an answer was filed (#17534, R., pp.43-46). Pizzuto also filed a motion to disqualify the district judge, the Honorable George Reinhardt, apparently contending he was biased because he presided over Pizzuto's trial and sentencing.[3] (#17534, Tr., 2-10-87, pp.18-21.) The motion was denied with Judge Reinhardt stating, "This Court is neither biased

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[1] The parties stipulated to have the district court take judicial notice of the clerk's records and transcripts associated with Pizzuto's underlying convictions, death sentences and prior post-conviction cases. (#34845, R., pp.352-58.) Therefore because of the multiple records and transcripts associated with Pizzuto's other appeals which are involved in this appeal, the state will refer to the records and transcripts by their respective supreme court numbers, including: (1) #16489, underlying criminal appeal and sentencing; (2) #17534, first post-conviction case; (3) #21637, second post-conviction case; (4) #24802, third post-conviction case; (5) ##22075/33907, fourth post-conviction case; (6) #32679, fifth post-conviction case; and (7) #34845, sixth and instant post-conviction case.

[2] Because the amended petition is not part of the Clerk's Record, the claims raised in the petition are unknown.

[3] Neither the motion nor supporting affidavit are part of the Clerk's Record.

nor prejudiced nor [sic] against either party to the action." (#17534, Tr., 4-7-88, p.1.) After an evidentiary hearing, Judge Reinhardt entered Findings of Fact and Conclusions of Law, denying Pizzuto post-conviction relief. (#17534, R., pp.153-159.)

Pizzuto also filed a Motion for New Trial, seeking reconsideration of Judge Reinhardt's decision in the post-conviction case (#17434, Supp. R., pp.3-7), during which he filed another Motion for Disqualification, contending Judge Reinhardt "may have become a witness in this matter concerning what information he received prior to sentencing which was not disclosed to the defense" (#17534, Second Supp. R., pp.76-77). Pizzuto later withdrew his Motion for Disqualification. (#17534, Tr. 6-29-88, pp.1-3.)

On appeal, the Idaho Supreme Court vacated Pizzuto's robbery conviction, concluding it merged as a lesser-included offense of felony-murder. Pizzuto I, 119 Idaho at 756-58. Pizzuto's remaining convictions, sentences and denial of post-conviction relief were affirmed in June 1991. Id. at 778. Addressing the denial of Pizzuto's motion to disqualify Judge Reinhardt, the court concluded:

> [W]e find no basis to believe that the purpose of the trial court's examination of witnesses was in an attempt to elicit testimony favorable to the State's position. However, even if this motivation alleged by Pizzuto were true, Pizzuto failed to specify the exact incidents of this alleged misconduct. Pizzuto therefore asks us to speculate as to the motivation behind Judge Reinhardt's questions to determine if he was prejudiced against Pizzuto. We find this assertion to be without merit and we find no abuse of discretion by the trial court.

Id. at 777 (internal citation omitted).

Statement Of Facts And Course Of Pizzuto's Second Post-Conviction Case

Pizzuto filed his first federal habeas petition in 1992. Pizzuto v. Arave, 280 F.3d 949, 954 (9th Cir. 2002). While his habeas petition was pending, on April 18, 1994,

Pizzuto returned to state court and filed his second Petition for Post-Conviction Relief. (#21637, R., pp.1-29.) Among other claims, Pizzuto expressly contended he was denied due process based, in part, upon "off-the record comments to members of Mr. Pizzuto's family, including Mr. Pizzuto's mother, Pamela R. Pizzuto, his father, Gerald R. Pizzuto, Sr., and his sister, Toni J. King, which demonstrate that Judge Reinhardt had a bias against Petitioner which prevented him from giving Petitioner a fair trial." (#21637, R., pp.15-16.) Pizzuto moved to disqualify Judge Reinhardt.[4] Relying upon I.C. § 19-2719, the state filed a motion to dismiss, asserting the court was without jurisdiction to consider the claims in the petition because it was successive and contained claims that were known or reasonably should have been known at the time Pizzuto brought his first petition. (#21637, R., pp.30-31.) The court granted the state's motion. (#21637, R., pp.46-47.) Based upon the jurisdictional aspects of I.C. § 19-2719, the court denied Pizzuto's motion to disqualify because it was moot. (#21637, R., p.47.)

Based upon I.C. § 19-2719, the Idaho Supreme Court dismissed Pizzuto's appeal in August 1995, because he failed to establish the claims were not known and reasonably could not have been known when he filed his first petition, including his claim of judicial bias. Pizzuto v. State, 127 Idaho 469, 471-72, 903 P.2d 58 (1995) (Pizzuto II). Addressing Pizzuto's motion to disqualify Judge Reinhardt, the supreme court declined to address the issue because the state had filed a motion to dismiss the appeal based upon I.C. § 19-2719, which is "jurisdictional in nature, . . . specifically depriving the courts of Idaho of the power to consider any claims for relief that have been waived under the

[4] The Clerk's Record does not contain Pizzuto's motion. In his Petition for Post-Conviction Relief Pizzuto "seek[s] the recusal of Judge George Reinhardt for all proceedings henceforth." (#21637, R., p.4.)

statute." Id. at 471. Therefore, because the court was "not reviewing or deferring to any determination made by the court below," it proceeded directly to address the state's motion to dismiss the appeal. Id.

Statement Of Facts And Course Of Pizzuto's Third Post-Conviction Case

Upon returning to federal court, the district court denied federal habeas relief in April 1997. Pizzuto, 280 F.3d at 954. While Pizzuto's appeal before the Ninth Circuit was pending, he returned to state court and filed another successive post-conviction petition, alleging the state withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), involving his co-defendants William Odom and James Rice. (#24802, R., pp.1-11.) The district court permitted the petition to be amended with prosecutorial misconduct and ineffective assistance of counsel claims, both based upon alleged perjured testimony. (#24802, R., pp.152-68, 195-96.) Pizzuto also filed another motion to disqualify Judge Reinhardt, "due to his failure to disclose certain exculpatory or other discoverable information to trial counsel concerning the Defendant and/or co-defendants/James Rice and William Odom." After hearing from Pizzuto's sister, Tony Lacasellaa, aka Toni J. King, and reviewing various affidavits, the district court denied Pizzuto's Motion to Disqualify for Cause, concluding "The Court's neither prejudice [sic] for or against any party or case in this matter." (#24802, Tr., pp.4-16.) The court also entered a written decision. (#24802, R., pp.193-95.) Pursuant to I.C. § 19-2719, the state again moved to dismiss Pizzuto's successive petition (#24802, R., pp.45-46), which the district court granted because Pizzuto failed to establish he could not have raised the claims in his earlier petitions for post-conviction relief (#24802, R., pp.193-207).

The Idaho Supreme Court affirmed in September 2000, because: (1) Pizzuto knew of the information or could have discovered it at an earlier date; (2) more than ten years had passed since the information could reasonably have been known; and (3) the allegedly withheld information "would have been used only to impeach the testimony of Rice and Odom," which cannot constitute a basis for filing a successive post-conviction petition under I.C. § 19-2719. Pizzuto v. State, 134 Idaho 793, 797-99, 10 P.3d 742 (2000) (Pizzuto III). Addressing the motion to disqualify, the supreme court explained, "Pizzuto has unsuccessfully challenged Judge Reinhardt's refusal to disqualify himself from this case since Pizzuto's first appeal," and "Pizzuto has failed to show that Judge Reinhardt abused his discretion in refusing to disqualify himself." Id. at 799.

Statement Of Facts And Course Of Pizzuto's Fourth Post-Conviction Case

On February 6, 2002, the Ninth Circuit affirmed the denial of federal habeas relief. *See* Pizzuto v. Arave, 280 F.3d 949 (9th Cir. 2002).[5] The Supreme Court denied Pizzuto's Petition for Writ of Certiorari. Pizzuto v. Fisher, 546 U.S. 976 (2005).

On July 30, 2002, while the mandate was stayed in the Ninth Circuit, Pizzuto v. Arave, 280 F.3d 1217 (9th Cir. 2002), Pizzuto filed his fourth Petition for Post-Conviction Relief and a Motion to Correct Illegal Sentences, contending his death sentence violated the dictates of Ring v. Arizona, 536 U.S. 584 (2002), in which the Supreme Court concluded juries must find statutory aggravating factors. (##22075/33907, R., pp.1-10.) On December 16, 2005, the district court dismissed Pizzuto's successive petition and Rule 35 motion because Ring is not retroactive to cases on collateral review.

[5] Pizzuto's motion to enlarge the record on appeal, motion to remand to supplement his federal habeas petition and his first Application for Permission to File Second Petition for Writ of Habeas Corpus in the District Court were denied. Pizzuto, 280 F.3d at 954 n.1.

(##22075/33907, R., pp.88-90.) Pizzuto did not request the disqualification of Judge Reinhardt when he presided over Pizzuto's fourth post-conviction case.

Pursuant to I.C. § 19-2719, the state filed a Motion to Dismiss Appeal, which the Idaho Supreme Court granted in an unpublished Order on December 28, 2006. (Appendix A (Pizzuto IV).) However, certiorari was granted by the United States Supreme Court, and the Idaho Supreme Court's order "vacated, and the cause is remanded to the Supreme Court of Idaho for further consideration in light of *Danforth v. Minnesota*, 552 U.S. ___ (2008)." Pizzuto v. Idaho, --- U.S. ---, 128 S.Ct. 1441 (2008). Pizzuto's appeal on remand remains pending before the Idaho Supreme Court.

Statement Of Facts And Course Of Pizzuto's Fifth Post-Conviction Case

On June 19, 2003, Pizzuto filed his fifth post-conviction petition contending his death sentences violate Atkins v. Virginia, 536 U.S. 304 (2002), in which the Supreme Court concluded mentally retarded murderers cannot be executed. (#32679, R., pp.1-10.) Again, Pizzuto filed a motion to disqualify Judge Reinhardt (#32679, R., pp.122-24), which was denied (#32679, R., pp.193-94). Judge Reinhardt also concluded Pizzuto's petition was not timely filed under I.C. § 19-2719, because it was not filed within forty-two days after the Supreme Court issued Atkins. (#32679, R., pp.309-10.) Alternatively, the petition was not timely filed "within a 'reasonable time' following *Atkins*," because "the allegations supporting the Ring [sic] Petition were based upon facts known at the time of Pizzuto's sentencing." (#32679, R., p.310.) The court concluded even if the petition was timely filed, "Pizzuto failed to raise a genuine issue of material fact supporting his claim of mental retardation." (#32679, R., p.310.)

Addressing Pizzuto's motion to disqualify, the Idaho Supreme Court detailed Pizzuto's history of attempting to disqualify Judge Reinhardt, particularly the attempts based upon the affidavits of Pizzuto's family members, and concluded, "Pizzuto has known of the statements attributed to Judge Reinhardt since his trial. He has had ample opportunity to assert they are evidence of bias in his first and third post-conviction petition proceedings, and he chose not to do so. He has therefore waived any claim of bias based upon those alleged statements. Judge Reinhardt did not err in refusing to grant the motion for disqualification." Pizzuto v. State, --- Idaho ---, 2008 WL 466568, *4-6 (2008) (Pizzuto V). Addressing Pizzuto's mental retardation claim, the supreme court affirmed, concluding he failed to raise a genuine issue of material fact. Id. at *7-12.[6]

Statement Of Facts And Course Of Pizzuto's Sixth (Instant) Post-Conviction Case

On November 25, 2005, Pizzuto filed his instant successive post-conviction petition contending the state withheld exculpatory evidence based upon an alleged "undisclosed deal with James Rice that he would receive a 20 year sentence and serve even less actual time," "prosecutorial misconduct" based upon the concealment of the alleged plea agreement with Rice and allegedly knowingly introducing false evidence regarding blood found in the cabin where the murders occurred and on Pizzuto's clothing, judicial misconduct, and actual innocence. (#34845, R., pp.22-24.)

Pursuant to I.R.C.P. 40(d)(1), the state filed a Motion to Disqualify, without cause, the Honorable John Bradbury (#34845, R., pp.306-07), which was granted (#34845, R., p.309). Based upon a request for "assignment of a district judge outside

[6] Pizzuto was permitted to file a successive federal habeas petition based upon Atkins, which is pending before the district court. *See* Pizzuto v. Hardison, CV-05-516-S-BLW.

Idaho County, Second Judicial District," the Idaho Supreme Court ordered Pizzuto's case be reassigned "within the Fourth Judicial District." (#34845, R., p.329.) The Honorable Darla Williamson was assigned to Pizzuto's case. (#34845, R., p.331.)

The state filed an answer (#34845, R, pp.341-48), and a Motion for Summary Dismissal primarily asserting Pizzuto failed to establish the claims in his successive petition were not known or reasonably could not have been known when he filed his first post-conviction petition (#34845, R., pp.366-68). On May 8, 2006, Pizzuto moved to amend his petition seeking to add two additional claims, denial of an impartial judge and cumulative error. (#34845, R., pp.369-73.) Although the state objected, asserting the claims were futile under I.C. § 19-2719 because they were untimely (#34845, R., pp.413-19), the district court granted Pizzuto's motion (#34845, R., pp.499-501).

In a decision that barely considers whether the claims were known or reasonably could have been known when Pizzuto filed his first post-conviction petition, the district court denied post-conviction relief on all claims, except a claim of judicial misconduct involving "the fundamental fairness of [Pizzuto's] sentencing," which the court cobbled together from a supporting affidavit. (#34845, R., pp.501-15.)[7] The district court also struck the state's supplemental brief because an evidentiary hearing hear already been scheduled and "[t]here [was] insufficient time before the evidentiary hearing scheduled on June 26, 2006, to allow more briefing on the motion for summary dismissal."

[7] The district court opined that Pizzuto's "cumulative error" claim survived, only because it is "directly related to and derivative of the claim of judicial misconduct involving the dinner conversation in the presence of Angellina Rawson." (#34845, R., p.515 n.11.)

(#34845, R., p.519.)[8] Pizzuto's June 12, 2006 Motion to Reconsider (#34845, R., pp.547-50), was denied by the district court on June 15, 2006 (#34845, R., pp.561-66).

At the conclusion of a hearing on June 22, 2005, Judge Williamson stated, "I need to talk to the parties off the record as to the issue of Judge Reinhardt." (#34845, Tr., 6-22-06, p.51.) That same day, Judge Williamson recused herself from Pizzuto's case. (#34845, R., p.600),[9] and the Honorable Deborah Bail was assigned to preside over Pizzuto's case (#34845, R., p.601).

On July 20, 2006, the state filed a Motion to Reconsider, asking Judge Bail to reconsider Judge Williamson's denial of the remaining claims. (#34845, R., pp.611-13.) On August 16, 2007, Pizzuto's case was reassigned to the Honorable Patrick H. Owen (#34845, R., p.625) because the Idaho Legislature authorized an additional district judge in the Fourth Judicial District and Pizzuto's case was one of Judge Owen's reassigned cases (#34845, R., p.641 n.3). After hearing oral argument (#34845, Tr., 9-26-07), on October 31, 2007, Judge Owen granted the state's Motion to Reconsider, concluding Pizzuto's claim regarding judicial bias at sentencing was known or reasonably could have been known when the first post-conviction petition was filed, and dismissing the remaining claims in the successive petition. (#34845, R., pp.637-48.) Pizzuto's timely Notice of Appeal was filed December 12, 2007. (#34845, R., pp.651-54.)

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[8] Oral argument on the state's Motion for Summary Dismissal was held May 25, 2006, which was the parties' first hint the district court was cobbling together a claim of judicial misconduct at sentencing based upon a supporting affidavit. (#34845, Tr., 5-25-06, pp.35-43.) The state's supplemental brief was filed the following day on May 26, 2006. (#34845, R., p.672, referencing exhibit 15.)

[9] While Judge Williamson did not disclose on the record the reason for her recusal, in a subsequent pleading the state averred she advised the parties she had been a plaintiff in a lawsuit presided over by Judge Reinhardt, *see* In re Williamson, 135 Idaho 452, 19 P.3d 766 (2001), and recused herself to avoid the appearance of impropriety. (#34845, R., p.672A, referencing exhibit 29, pp.4-5.)

ISSUES

Contrary to I.A.R. 35(a)(4), Pizzuto has failed to state any issues on appeal. The state wishes to phrase the issue on appeal as follows:

1. Because Pizzuto's case is governed by I.C. § 19-2719 and he has failed to make a *prima facie* showing that the claims in his successive petition were not known or reasonably could not have been known when he filed his first post-conviction petition in 1986, or the claims were not filed within a reasonable time after they were known or reasonably could have been known, or the claims are based upon nothing more than impeaching evidence, is this Court without jurisdiction to hear the claims, requiring dismissal of this appeal?

Alternatively, should this Court conclude Pizzuto has passed the gateway established by I.C. § 19-2719, the state phrases the issues as follows:

2. Because Pizzuto failed to comply with I.A.R. 35(a)(4) by providing a list of issues on appeal, is this Court precluded from addressing the merits of his appeal?

3. Has Pizzuto failed to raise a genuine issue of material fact regarding his "judicial misconduct" claims which were actually pled in his amended successive petition?

4. Has Pizzuto failed to raise a genuine issue of material fact regarding his "prosecutorial misconduct" claim?

5. Has Pizzuto failed to raise a genuine issue of material fact regarding his "actual innocence" claim?

6. Has Pizzuto failed to raise a genuine issue of material fact regarding his "cumulative error" claim?

7. Has Pizzuto failed to establish Judge Owen abused his discretion by reconsidering Judge Williamson's decision regarding the "dinner" claim of judicial misconduct because the state was not required to present additional evidence or argument?

8. Has Pizzuto failed to establish the district court abused its discretion by denying Pizzuto's request to depose five additional individuals when Pizzuto failed to establish they were necessary to protect his substantial rights and the district court authorized the depositions of two individuals?

9. Has Pizzuto failed to establish the district court abused its discretion by denying his request to submit seven documents that were irrelevant to the issue of whether he could overcome the procedural bars of I.C. § 19-2719 and were inadmissible under Idaho's rules of evidence?

ARGUMENT

I.

Pizzuto Has Failed To Meet His Burden Of Overcoming The Procedural Bars Of I.C. § 19-2719, Which Governs Successive Post-Conviction Petitions In Capital Cases

A. Introduction

In his Amended Petition for Post-Conviction Relief Pizzuto raised the following claims: (1) the withholding of exculpatory evidence based upon "crucial impeachment evidence" involving an alleged "secret deal" with Rice in which Rice would receive a twenty-year sentence, and knowingly eliciting "false testimony" regarding the alleged deal with Rice; (2) prosecutorial misconduct based upon: (a) the prosecutor's "deliberate concealment of the plea bargain" allegedly provided to Rice; (b) "knowingly introducing false evidence regarding blood found in the cabin where the murders supposedly occurred, and false evidence regarding blood found on what it asserted were petitioner's clothes"; (3) judicial misconduct based upon (a) Judge Reinhardt allegedly participating in off-the-record plea negotiations with Rice's attorney and the prosecutor which were not disclosed to Pizzuto's counsel and "created a false public record about the plea"; (b) creating a record for Rice which "used deliberately false testimony to convict" Pizzuto; (c) permitting the prosecutor to use false testimony to convict Pizzuto; (d) "engag[ing] in ex parte contact with the jurors during deliberations and more particularly following their verdict but before the sentencing proceedings"; and (e) the district court also cobbled together a claim of judicial bias based upon a supporting affidavit stemming from Judge Reinhardt's alleged statements during dinner with Rice's attorney, the prosecutor, former Sheriff Randy Baldwin, and Pizzuto's sister, Angellina Rawson, aka Pizzuto; (4) denial of due process and an impartial judge stemming from Judge Reinhardt's "continued

assignment of this case and its related postconviction proceedings"; (5) cumulative error; and (6) actual innocence. (#34845, R., pp.400-03.)

Pizzuto opens his brief discussing the merits of his claims, the denial of an evidentiary hearing, and various discovery issues. (Appellant's brief, pp.18-45.) However, before these issues can be addressed, Pizzuto must first demonstrate he has complied with the dictates of I.C. § 19-2719 because this appeal involves the denial of relief from a successive post-conviction petition in a capital case. Because he has failed to meet his burden under I.C. § 19-2719, Pizzuto's appeal must be dismissed.

B. Standard Of Review

The Idaho Supreme Court recently articulated the standard of review in appeals stemming from the denial of post-conviction relief in capital successive petitions. "When this Court is presented with a motion to dismiss by the State based upon the provisions of Idaho Code § 19-2719, the proper standard of review this Court should utilize is to directly address the motion, determine whether or not the requirements of section 19-2719 have been met, and rule accordingly." Hairston v. State, 144 Idaho 51, 55, 156 P.3d 552 (2007) (quoting Creech v. State, 137 Idaho 573, 575, 51 P.3d 387 (2002)), *remanded on other grounds by* Hairston v. Idaho, --- U.S. ---, 128 S.Ct. 1442 (2008).

C. Pizzuto's Successive Post-Conviction Petition Is Governed By I.C. § 19-2719

Idaho Code § 19-2719 sets forth special appellate and post-conviction procedures in all capital cases. Capital post-conviction proceedings, like non-capital post-conviction proceedings which are governed by the Uniform Post-Conviction Procedure Act ("UPCPA"), are civil in nature and governed by the Idaho Rules of Civil Procedure.

Pizzuto v. State, 127 Idaho 469, 470, 903 P.2d 58 (1995). Idaho Code § 19-2719 does not eliminate the applicability of the UPCPA in capital cases, but acts as a modifier and "supersedes the UPCPA to the extent that their provisions conflict." McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144 (1999); Pizzuto, 127 Idaho at 470.

Specifically, I.C. § 19-2719 provides a capital defendant one opportunity to raise all challenges to the conviction and sentence in a post-conviction relief petition which must be filed within forty-two days after entry of judgment. State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991). The **only exception** is provided in I.C. § 19-2719(5), which permits a successive petition "in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute." Id., 120 Idaho at 807. A capital defendant who brings a successive petition for post-conviction relief has a "heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute." Pizzuto, 127 Idaho at 471.

Additionally, claims which were not known or which could not have reasonably been known within forty-two days of judgment "must be asserted within a reasonable time after they are known or reasonably could have been known." Paz v. State, 123 Idaho 758, 760, 852 P.2d 1355 (1993); McKinney, 133 Idaho at 701. In ascertaining what constitutes a "reasonable time," the Idaho Supreme Court has recently explained:

> [A] reasonable time for filing a successive petition for post-conviction relief is forty-two days after the petitioner knew or reasonably should have known of the claim, unless petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable.

Pizzuto V, 2008 WL 466568, *6.

A successive post-conviction petition is "facially insufficient" if it merely alleges "matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence." I.C. § 19-2719(5)(b). If evidence is merely cumulative with evidence already within the possession of the defense at the time the first petition for post-conviction relief is filed, a procedural bar exists mandating dismissal of the successive petition. Sivak v. State, 134 Idaho 641, 647-49, 8 P.3d 636 (2000).

Even if the petitioner can meet these mandates, I.C. § 19-2719(5)(a) details the additional requirements that must be met before the successive petition may be heard:

> An allegation that a successive post-conviction petition may be heard because of the applicability of the exception herein for issues that were not known or could not reasonably have been known shall not be considered unless the applicant shows the existence of such issues by (i) a precise statement of the issue or issues asserted together with (ii) material facts stated under oath or affirmation by credible persons with first hand knowledge that would support the issue or issues asserted. A pleading that fails to make a showing of excepted issues supported by material facts, or which is not credible, must be summarily dismissed.

I.C. § 19-2719(5)(a).

If a capital petitioner fails to comply with the requirements of I.C. § 19-2719, the issues are "deemed to have [been] waived" and "[t]he courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief." I.C. § 19-2719(5); McKinney, 133 Idaho at 700. Likewise, failure to meet the requirements of I.C. § 19-2719(5)(a) mandates dismissal of the successive post-conviction petition. Fields v. State, 135 Idaho 286, 289-90, 17 P.3d 230 (2000).

In State v. Beam, 115 Idaho 208, 213, 766 P.2d 678 (1988), the Idaho Supreme Court discussed the purpose and policy behind the passage of I.C. § 19-2719:

> The underlying legislative purpose behind the statute stated the need to expeditiously conclude criminal proceedings and recognized the use of dilatory tactics by those sentenced to death to "thwart their sentences." The statute's purpose is to "avoid such abuses of legal process by requiring that all collateral claims for relief . . . be consolidated in one proceeding. . . ." We hold that the legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences.

The United States Supreme Court has specifically approved requiring a criminal defendant to present all of his collateral claims in a single post-conviction proceeding. In Murch v. Mottram, 409 U.S. 41 (1972), the Court, discussing federal habeas corpus proceedings which prohibit piecemeal litigation by requiring that all claims be brought in a single petition for a writ of habeas corpus, explained the respective states can employ a similar procedure for post-conviction relief procedures. The Court concluded:

> There can be no doubt that States may likewise provide, as Maine has done, that a prisoner seeking post-conviction relief must assert all known constitutional claims in a single proceeding. Indeed, the Court of Appeals agreed that the Maine statutory scheme was an "orderly procedure of the state courts," as that term is used in *Fay v. Noia*, [372 U.S. 391, 438, 83 S. Ct. 822, 849, 9 L. Ed. 2d 837 (1963)]. No prisoner has a right either under the Federal Constitution or under 28 U.S.C. § 2241 to insist upon piecemeal collateral attack on a presumptively valid criminal conviction in the face of such a statutory provision.

Id. at 45-46.

Idaho Code § 19-2719 also has a great deal of interplay with federal habeas law. The ability of states to ensure their judgments carry a measure of finality rather than being subject to repetitive federal attack, depends on the regular and consistent enforcement of state procedural rules and bars. Addressing the interplay between state

procedural bars and federal review, the Supreme Court, in Johnson v. Mississippi, 486 U.S. 578, 587 (1988), refused to honor a state procedural bar, and explained:

> [W]e consider whether that bar provides an adequate and independent state ground for the refusal to vacate petitioner's sentence. "[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry v. Mississippi*, 379 U.S. 443, 447, [85 S. Ct. 564, 567, 13 L. Ed. 2d 408] (1965). "[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' *Barr v. City of Columbia,* 378 U.S. 146, 149, [84 S. Ct. 1734, 1736, 12 L. Ed. 2d 766] (1964)." *Hathorn v. Lovorn*, 457 U.S. 255, 262-263, 102 S. Ct. 2421, 2426-2427, 72 L. Ed. 2d 824 (1982); *see Henry v. Mississippi*, 379 U.S. at 447-448, 85 S. Ct. at 567-568. We find no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied. Rather, the weight of Mississippi law is to the contrary.

The Idaho Supreme Court has historically followed the requirements of I.C. § 19-2719, strictly and regularly dismissing successive capital post-conviction relief claims because of petitioners' failure to meet the narrow exception of I.C. § 19-2719(5). *See e.g.,* Creech v. State, 137 Idaho 573, 51 P.3d 387 (2002); Rhoades v. State, 135 Idaho 299, 17 P.3d 243 (2000); Paradis v. State, 128 Idaho 223, 912 P.2d 110 (1996); Pizzuto v. State, 127 Idaho 469, 903 P.2d 58 (1995); Lankford v. State, 127 Idaho 100, 897 P.2d 991 (1995); Paz v. State, 123 Idaho 758, 852 P.2d 1355 (1993); Fetterly v. State, 121 Idaho 417, 825 P.2d 1073 (1991). The Court has also historically followed the requirements of I.C. § 19-2719, strictly and regularly affirming the district courts' dismissal of successive capital post-conviction claims because of petitioners' failure to meet the narrow exceptions of I.C. § 19-2719(5), including the pleading requirements of I.C. §§ 19-2719(5)(a) and (b). *See* Fields v. State, 135 Idaho 286, 17 P.3d 230 (2000); Pizzuto v. State, 134 Idaho 793, 10 P.3d 742 (2000); Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000); McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999).

Pizzuto contends his sixth post-conviction petition is not governed by I.C. § 19-2719 because, "The manifest injustice language [of I.C. § 19-4901(4)] is not precluded by I.C. § 19-2719 and is therefore available in capital cases." (Appellant's brief, p.47.) Assuming without conceding I.C. § 19-4901(4) permits the filing of a successive post-conviction petition in non-capital cases, the filing of a successive post-conviction petition in a capital case is governed exclusively by I.C. § 19-2719 and is "allowed **only** where the petitioner can demonstrate that the issues raised were not known or could not reasonably have been known within the 42-day time frame." McKinney, 133 Idaho at 700-01 (emphasis added). The only exception permitting the filing of a successive post-conviction petition in a capital case is for claims that were not known or could not reasonably have been known within the forty-two day requirement of I.C. § 19-2719. There are no exceptions for "manifest injustice," "fundamental error," "plain error" or any exception other than a claim that was not known or could not reasonably have been known at the time the initial post-conviction petition was filed.

Pizzuto's reliance upon Sivak, 134 Idaho at 647, is likewise unavailing. The Idaho Supreme Court has never stated it would "consider claims notwithstanding Idaho Code Section 19-2719." (Appellant's brief, p.47.) Rather, Sivak merely stands for the proposition that a defendant can resurrect an old claim with newly discovered evidence if that evidence was not known and could not reasonably have been known when the first post-conviction petition was filed. Id. at 647 (rejecting the state's theory that Sivak waived his claim for relief "merely because he raised the issue in his first post-conviction petition"). Sivak does not establish an independent exception to I.C. § 19-2719 based upon "manifest injustice," "egregious injustice." or any other exception except claims

that are based upon new facts that were not known and reasonably could not have been known when the first post-conviction petition was filed.

D. This Court Should Dismiss The Instant Appeal Without Addressing The Merits Of Pizzuto's Claims In His Successive Petition

A capital defendant who brings a successive petition for post-conviction relief has a "heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute." Pizzuto, 127 Idaho at 471; *see also* McKinney, 133 Idaho at 701. If a petitioner fails to make the requisite showing, "The courts of Idaho shall have no power to consider any such claims for relief." I.C. § 19-2719(5). In Fetterly, 121 Idaho at 419, the court recognized the petitioner's failure to raise the issues in his first petition for post-conviction relief resulted in a waiver of the issues. As a result, the court dismissed the appeal. Id. at 419. In Paz, the petitioner filed a motion to stay execution after the district court dismissed his second petition for post-conviction relief. Shortly thereafter, the supreme court ordered the respective parties to simultaneously file briefs addressing the question of whether there were new grounds for post-conviction relief. After reviewing the briefing and hearing oral argument addressing only the jurisdictional issue, the Idaho Supreme Court dismissed Paz's appeal. Id., 123 Idaho at 758-60. In Lankford, 127 Idaho at 101, the state filed a motion to dismiss the appeal alleging I.C. § 19-2719 barred consideration of the petitioner's successive petition. After reviewing the claims asserted in the successive petition and the supporting documents, the court concluded Lankford "failed to assert any claim not barred by I.C. § 19-2719," and dismissed his appeal. Id. at 102.

By dismissing a petitioner's appeal from the denial of a successive petition for post-conviction relief, this Court sends a clear message to the federal courts of its intent to consistently apply the procedural bar associated with I.C. § 19-2719 and that the basis for the decision is the procedural bar, not federal law. *See* Coleman v. Thompson, 501 U.S. 722 (1991). The Supreme Court has recognized, "It is not always easy for a federal court to apply the independent and adequate state ground doctrine." Id. at 732. However, when this Court explicitly invokes the state procedural bar, the state decision is based upon an independent and adequate state rule even if the Court alternatively addresses the merits of a federal claim. Harris v. Reed, 489 U.S. 255, 264 n.10 (1989). When this Court's opinions addressing successive post-conviction petitions do not "fairly appear to rest primarily on federal law or to be interwoven with federal law," it cannot be presumed the court based its decision on federal law. Coleman, 501 U.S. at 735. However, when, as in Coleman, 501 U.S. at 740-41, this Court "state[s] plainly it [is] granting the [state's] motion to dismiss the . . . appeal," the federal courts recognize the Court's application of I.C. § 19-2719 and that it is an independent and adequate state doctrine.

Pizzuto's failure to make a *prima facie* showing that the claims in his successive petition comply with the dictates of I.C. § 19-2719 requires dismissal of his appeal.

E. Pizzuto Has Failed To Make A *Prima Facie* Showing That His Successive Post-Conviction Claims Are Not Barred By I.C. § 19-2719

1. Pizzuto's Prosecutorial Misconduct Claims Were Known Or Reasonably Could Have Been Known When He Filed His First Petition

As explained in McKinney, 133 Idaho at 706-07, "Even if the State violated [Pizzuto's] right to due process . . . , [Pizzuto] was required to raise this issue, like other

constitutional issues, within the time frame mandated by I.C. § 19-2719." *See also* Porter, 136 Idaho at 261. In a successive petition for post-conviction relief, Pizzuto is required to "make the required *prima facie* showing that the issues could not reasonably have been known during the first proceeding." McKinney, 133 Idaho at 707. Therefore, this Court must "initially examine[ ] whether the information alleged by [Pizzuto] to be exculpatory reasonably should have been known at the time of [Pizzuto's] first post-conviction petition." Porter, 136 Idaho at 261.

In his first two claims, Pizzuto contends the state withheld exculpatory evidence by failing to disclose an alleged deal with Rice involving a twenty-year sentence, that the state knowingly introduced false evidence regarding the benefits conferred upon Rice from the alleged plea agreement, and the state knowingly introduced false evidence regarding blood found in the cabin where the Herndons were murdered and on Pizzuto's clothes. (#34845, R., pp.400-01.)

a. The Alleged "Deal" With Rice

Pizzuto's claim regarding the alleged deal with Rice is based upon Rice's affidavit, the affidavit of his former wife, Joy Tara, and notes and billings from Rice's former attorney. (#34845, R., pp.392-97.) However, Pizzuto failed to explain why the information from Rice, Tara, and the notes and billings could not have been presented during his first post-conviction proceedings. Admittedly paragraph fifteen of Rice's affidavit states:

> I was contacted once in the past by an investigator for the Capital Habeas Unit of the Federal Defenders of the Eastern District of Washington and Idaho while I was serving my prison sentence on the Second Degree murder conviction out of Idaho. I did not tell the investigator about my deal because I did not want to jeopardize my parole.

> After I was released from prison, I did not seek to tell anyone about the deal because I might need the Idaho authorities to vouch for me one day. In fact, I was charged in a criminal case in California and my attorney did ask the prosecutor, Henry Boomer, to help me with my case. Now, I am in prison for life because I was a three strikes defendant, and I have nothing to lose by coming forward with the truth. I also don't think Gerald Pizzuto should die because he was put up to the crime by Bill Odom.

(#34845, R., pp.33-34.)

Rice's affidavit was allegedly signed on September 28, 2005. Id. However, in the margin of Rice's affidavit at the beginning of paragraph fifteen is the handwritten word, "Excluding" with the handwritten initials "JR." (#34845, R., p.33.) This reveals Rice disavowed the contents of paragraph fifteen. Therefore, Pizzuto provided the district court with no admissible evidence that Rice previously refused to disclose the alleged "deal" with the prosecutor. Admittedly, Rice allegedly signed another affidavit in which he attempted to explain his use of the word, "Excluding." (#34845, R., pp.478-79.) However, Rice's explanation is somewhat vague and convoluted; he never expressly stated he was previously asked by any investigator regarding his alleged "deal" and then refused to answer the question or deliberately lied regarding the alleged deal. Moreover, it is clear from the Affidavit of Richard S. Hays that any investigation regarding Rice's alleged plea agreement was not even commenced until 1997, more than eleven years after Pizzuto's first post-conviction petition was filed. (#34845, R., p.481.) Therefore, even if Rice had been more forthcoming, Pizzuto would not have raised the claim in his first petition because he failed to even question Rice until December 2, 1997.

Further, there is no evidence the information in Tara's affidavit was not available when Pizzuto filed his first post-conviction petition. While she states she was "hiding from him (Rice)," Tara attended Rice's sentencing hearing (#34845, R., pp.36-39), and

there is evidence he was in prison for at least fourteen years after his sentencing hearing, negating the need to hide from him when Pizzuto filed his first post-conviction petition in 1986. This information was available at the time Pizzuto filed his first petition.

Finally, there is nothing suggesting the notes and billings from Rice's attorneys were not available when Pizzuto filed his first post-conviction petition. The billings are matters of public record that could have been obtained from the Idaho County Clerk. In fact, Pizzuto filed an affidavit from Julie Kaschmitter, an employer of Rice's former attorneys, which merely confirms the documents are "records from our former files" and does not indicate when they were actually obtained by Pizzuto or that they could not have been obtained when he filed his first post-conviction petition. (#34845, R., p.41.)

All of this information is indistinguishable from the evidence Pizzuto tried to use in his third post-conviction petition when he attempted to raise a claim based upon Brady regarding evidence the state allegedly withheld involving Rice and Odom. *See* Pizzuto, 134 Idaho at 796. The supreme court examined that evidence and recognized it was available in earlier post-conviction proceedings from a variety of sources. Id. at 798. Based upon the information Pizzuto presented to the district court, he has again failed to make a *prima facie* showing the information supporting the alleged "deal" was not known or could not reasonably have been known when he filed his first post-conviction petition.

b. The Blood Evidence

The entirety of Pizzuto's "blood evidence" claim is as follows:

> The prosecution further violated Mr. Pizzuto's due process and Sixth Amendment rights by knowingly introducing false evidence regarding blood found in the cabin where the murders supposedly

> occurred, and false evidence regarding blood found on what it asserted were petitioner's clothes.

(#34845, R., p.401.)

There is no reference regarding what "false evidence regarding blood" was actually presented by the state. While Pizzuto took great pains to discuss the blood evidence actually presented at trial (#34845, R., pp.397-400), there is nothing in his explanation indicating there is new or additional evidence that was not presented to the jury. Rather, his explanation is filled with speculation and innuendo that is not supported by facts and, for the most part, was presented at trial. In fact, while he at least attempted to explain why his claim regarding the alleged "deal" with Rice is timely (#34845, R., pp.389-90), Pizzuto made no such attempt regarding his "blood evidence" claim.

Pizzuto attempted to bolster his claim with additional affidavits. However, he has failed to explain why the information in the affidavits could not have been discovered when he filed his first post-conviction petition. For example, Pizzuto has failed to explain why the information from the respective jurors could not have been discovered when his first petition was filed. Nor does Pizzuto explain why he could not have uncovered the information in James H. Howell's affidavit, one of the bailiffs at Pizzuto's trial, when the first petition was filed. The information in the affidavits challenging the work and character of former Sheriff Randy Baldwin could readily have been discovered prior to the filing of the first petition, including, for example, the affidavits of Buck Kelty, Robert Meinen and David Riley. The affidavit of criminalist Kay M. Sweeney particularly reveals Pizzuto is merely attempting to delay the completion of his case under the guise of reinvestigating his case years after the time limitations have expired. Pizzuto should not be permitted to wait twenty years to hire another expert to

reinvestigate the forensic evidence associated with his case. This is exactly the type of delay tactics I.C. § 19-2719 is designed to prohibit.

Pizzuto has failed to make a *prima facie* showing that his "blood evidence" claim was not known or reasonably could not have been known when he filed his first post-conviction petition.

2. Pizzuto's Judicial Misconduct Claims Were Known Or Reasonably Could Have Been Known When He Filed His First Petition

Pizzuto's third claim regarding judicial misconduct is also based upon the alleged "deal" with Rice. (#34845, R., p.402.) As detailed above, because he has failed to make a *prima facie* showing that the facts regarding Rice's alleged "deal" and the alleged "supporting evidence" were not known or reasonably could not have been known when he filed his first post-conviction petition, Pizzuto's third claim was properly dismissed.

Judge Williamson also cobbled together a judicial bias claim based upon a single sentence in Pizzuto's third claim, "Judge Reinhardt was biased against Mr. Pizzuto" (#34845, R., p.402) and the Affidavit of Angellina Rawson, Pizzuto's sister, in which she recounts an alleged dinner with the prosecutor, sheriff and Judge Reinhardt during which Judge Reinhardt allegedly stated, "something to the whole group about how he was going to 'hang' my brother Jerry" (#34845, R., p.293). Irrespective of whether this claim is contained in Pizzuto's amended petition, it was known or reasonably could have been known when he filed his first post-conviction petition. Rawson's affidavit states:

> 15. I have not come forward until now for many reasons. After the trial, I tried to disappear. I didn't want to be found. I moved around a lot, from California, where I informed on a drug dealer in exchange for drug charges being dropped against me, to Kodiak Island, Alaska, to Tacoma, Washington. I continued to be a drug addict and alcoholic. I was depressed and suicidal. I had to deal with serious illness and disease. I

> suffered through a rape and serious beating. About four years ago, I moved to Juneau, Alaska and decided to straighten my life out. I am now under the care of doctors and counselors, and have an in-home caretaker. I am only now at a place where I can talk about this[.]

(#34845, R., p.294.)

While Rawson's affidavit discusses what she allegedly did after her brother's trial, there is no information detailing what efforts Pizzuto or his multiple attorneys took in locating and talking with Rawson or if she had contact with her brother while he was in prison awaiting the completion of his multiple appeals. Pizzuto's presumed failure to contact Rawson and learn of this claim is particularly perplexing considering this is not the first time a member of his family contended Judge Reinhardt made a disparaging remark about Pizzuto. In September 1993, three family members made similar allegations including: (1) Gerald Pizzuto, Sr., Pizzuto's father; (2) Pamela R. Pizzuto, Pizzuto's mother; and (3) Tony J. King, Pizzuto's sister. (#24802, R., pp.179-84.) The family members contended Judge Reinhardt "told them that Pizzuto was a 'murderer,' 'scum,' and that 'they were going to burn' Pizzuto." (#24802, R., pp.179-84.) Based upon the family members' affidavits, Pizzuto raised a claim in his successive petition that he was tried and sentenced by an impartial judge. (#21637, R., pp.15-16.)[10] Addressing this claim of "impartial judge" on appeal, the Idaho Supreme Court concluded it was a claim "that should be immediately apparent upon the completion of trial and sentencing." Pizzuto, 127 Idaho at 470.

If the claim of judicial bias based upon the allegations of the three other family members was a claim that was known or could reasonably have been known at the time

[10] The three family members' affidavits are not contained in the Clerk's Record of Pizzuto's second post-conviction case, but are contained in the Clerk's Record in his third post-conviction case. (#24802, R., pp.179-84.)

of Pizzuto's first post-conviction case, the instant claim based upon the allegation of a fourth family member is indistinguishable and had to be summarily dismissed. Based upon the allegations of Pizzuto's three family members, it would have been objectively reasonable for Pizzuto's attorneys to conduct additional investigation by contacting other witnesses, including Rawson. However, on the eve of his execution Pizzuto is merely attempting to resurrect the same claim raised by other family members that was known or reasonably could have been known when his first post-conviction petition was filed.

Further, Pizzuto's current counsel, Joan Fisher, filed an affidavit explaining she was appointed as his habeas attorney nine years ago and "directed that as complete a factual investigation including acquisition of prosecutorial files and interviews with the co-defendants be conducted as soon as practicable." (#34845, R., p.672, exhibit 11, which included Appendix B, Affidavit of Joan M. Fisher, p.2.) Based upon Fisher's affidavit and the allegations made by Pizzuto's three family members, it is unfathomable Rawson could not reasonably have been contacted until the eve of her brother's execution.[11]

The Idaho Supreme Court has implicitly recognized counsel cannot simply wait for information to come forward. Rather, the court has repeatedly explained counsel has a duty to investigate all claims during the first post-conviction petition proceedings. For example, evidence offered at a co-defendant's trial supporting a claim that the state withheld exculpatory evidence was known or reasonably could have been known within

[11] The Idaho Supreme Court again addressed the issue of the three family members' affidavits in his fifth post-conviction case involving Atkins, and concluded, "Pizzuto has known of the statements attributed to Judge Reinhardt since his trial. He has had ample opportunity to assert they are evidence of bias in his first and third post-conviction proceedings, and he chose not to do so. He has therefore waived any claim of bias based upon those alleged statements." Pizzuto V, 2008 WL 466568, *5.

the time frame allowed by I.C. § 19-2719; post-conviction counsel merely had to attend the co-defendant's trial or obtain relevant transcripts. *See* McKinney, 133 Idaho at 707. In Pizzuto's third post-conviction petition he raised claims regarding the withholding of exculpatory evidence, which the Idaho Supreme Court concluded could reasonably have been known if his counsel had simply examined other court files from his co-defendants. Pizzuto, 134 Idaho at 798. In Porter v. State, 136 Idaho 257, 261, 32 P.3d 151 (2001), counsel merely had to write a letter to the local sheriff and call the Idaho Department of Law Enforcement to obtain relevant information. Therefore, the supreme court concluded the claims reasonably should have been known at the time the first post-conviction petition was filed. Id.

Pizzuto has failed to establish the information provided by Rawson was not known or could not reasonably have been known when he filed his first post-conviction petition, requiring that it be dismissed, with his other claims, on appeal.

3. Denial Of Due Process And An Impartial Judge

Pizzuto's fourth claim is based upon "[t]he continued assignment of this case and its related postconviction proceedings to Judge Reinhardt over the insistent objections of Mr. Pizzuto including ex parte contacts and bias and prejudice." (#34845, R., p.402.) This claim is nothing more than a renewed attempt to relitigate Pizzuto's prior attempts to disqualify Judge Reinhardt. Clearly, this claim was known or reasonably should have been known, and arguably, was actually raised in prior post-conviction cases.

4. Cumulative Error

The entirety of Pizzuto's fifth claim reads as follows:

> The cumulative impact of the errors asserted herein violates Petitioner's rights to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and comparable rights under the Idaho Constitution.

(#34845, R., p.403.)

Because Pizzuto has failed to meet his burden of establishing any of his claims meet the requirements of I.C. § 19-2719, he has likewise failed to establish any "cumulative impact" associated with those claims was not known or reasonably could not have been known when he filed his first post-conviction petition.

5. Pizzuto's Actual Innocence Claim Was Known Or Reasonably Could Have Been Known When He Filed His First Petition

Pizzuto's actual innocence claim is premised upon the allegation that Rice's testimony is "not credible" based upon the alleged "deal," Odom allegedly being a paid informant and false blood evidence allegedly being presented by the state. (#34845, R., pp.403-04.) As detailed above, Pizzuto has failed to make a *prima facie* showing that the facts regarding Rice's alleged "deal" and the alleged "supporting evidence" were not known or reasonably could not have been known when he filed his first post-conviction petition. Likewise, the Idaho Supreme Court has already determined the claim regarding Odom allegedly being a paid informant was information that "could have been discovered much earlier by reviewing Odom's case file, which is on the public record." Pizzuto, 134 Idaho at 798. Finally, as detailed above, Pizzuto has failed to make a *prima facie* showing that the facts regarding the blood evidence were not known or reasonably could not have been known when he filed his first post-conviction petition. The evidence regarding the blood evidence was presented to the jury, which, based upon its guilty verdicts, rejected any allegation that something was inherently wrong with the evidence.

F. Pizzuto Has Failed To Establish The Claims In His Successive Petition Were Timely Filed

Even if the claims in Pizzuto's successive post-conviction petition were not known and could not reasonably have been known when he filed his first post-conviction petition, none of the claims have been asserted within a reasonable time after they were known or reasonably could have been known. In Paz, 123 Idaho at 760, the supreme court recognized I.C. § 19-2719 "implicitly establishes a framework for timeliness" for the filing of successive post-conviction petitions or claims. While not setting forth a specific time frame, the court concluded four years is not a reasonable period of time. Id. More recently, "following the principle from *Paz*," the supreme court concluded, "a two-and-one-half-year span from the date of the first appellate brief to the assertion of claims is an unreasonable length of time for the pursuit of post-conviction relief." Fields, 135 Idaho at 290. In Dunlap v. State, 131 Idaho 576, 577, 961 P.2d 1179 (1998), the supreme court concluded a petition filed within forty-two days after the appointment of new counsel was a reasonable time "under the circumstances of [the] case." In Rhoades, 135 Idaho at 301, the supreme court concluded a petitioner failed to show "justifiable reason for the six-month delay in filing" a successive post-conviction petition. However, as explained above, the Idaho Supreme Court has recently concluded a "reasonable time" "is forty-two days after the petitioner knew or reasonably should have known of the claim." Pizzuto V, 2008 WL 466568, *6.

Pizzuto contends he first became aware of Rice's alleged "deal" when Rice "acknowledged under oath on the 28th day of September, 2005." (#34845, R., p.389.) However, Pizzuto did not file his post-conviction petition until November 25, 2005 (#34845, R., p.8), fifty-three days after Rice signed the affidavit, which is obviously

beyond the forty-two day limitation period of I.C. § 19-2719. This does not include the time between the undisclosed date of the investigator's interview in September and the date Rice actually signed the affidavit.

Even if this Court rejects the state's forty-two-day argument, the claims raised in Pizzuto's successive post-conviction petition were not timely filed. Assuming this Court considers "excluded" paragraph fifteen of Rice's affidavit, Pizzuto has still failed to provide this Court with any evidence of when Rice was charged in the California criminal case, sentenced to life as a three strikes defendant and decided he had "nothing to lose by coming forward with the truth." (#34845, R., p.34.) Presumably, Pizzuto has failed to provide this information because he knows the information was available long before the filing of his current successive petition and he cannot meet the requisite time period for filing a successive petition. Based upon his failure to timely file his successive petition, as with his third post-conviction petition, *see* Pizzuto, 134 Idaho at 798-99, the claims must be dismissed on appeal.

G. Because Pizzuto's Petition Alleges Matters That Are Merely Impeaching, His Petition Is Facially Insufficient, Requiring Dismissal

Idaho Code § 19-2719(5)(b) further limits the ability of a capital petitioner to file a successive post-conviction petition. The statute reads as follows:

> A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it alleges matters that are cumulative or impeaching. . . .

The Idaho Court of Appeals expressly addressed what constitutes "impeaching evidence" in Small v. State, 132 Idaho 327, 334-35, 971 P.2d 1151 (Ct. App. 1998) (quoting Zimmerman v. Maricopa County Superior Ct., 402 P.2d 212, 215 (1965)):

> Unlike substantive evidence which is offered for the purpose of persuading the trier of fact as to the truth of a proposition on which the determination of the tribunal is asked, impeachment is that which is designed to discredit a witness, i.e., to reduce the effectiveness of his testimony by bringing forth evidence which explains why the jury should not put faith in him or his testimony. Examples of impeachment evidence would include prior inconsistent statements, bias, attacks on [the] character of a witness, prior felony convictions, and attacks on the capacity of the witness to observe, recall or relate.

As further explained in State v. Butcher, 137 Idaho 125, 136, 44 P.3d 1180 (Ct. App. 2002), "Impeachment evidence is offered to attack the credibility of the witness rather than to establish the existence or nonexistence of a disputed fact." *See also* State v. Roberts, 129 Idaho 325, 331, 924 P.2d 226 (Ct. App. 1995) ("Impeachment evidence is that which is offered to attack the credibility of a witness rather than to establish the existence or non-existence of a disputed fact").

In Sivak, 134 Idaho at 644, the petitioner claimed his right to due process was violated based upon the withholding of allegedly exculpatory evidence in violation of Brady. However, the court concluded the underlying basis of Sivak's claim, four allegedly newly discovered letters, was "only cumulative evidence within the meaning of I.C. § 19-2719(5)(b)." Sivak, 134 Idaho at 648. "Therefore, Sivak's petition based on the suppression of this evidence was barred under the operation of I.C. § 19-2719(5)." Id. at 649; *see also* Row v. State, 135 Idaho 573, 577, 21 P.3d 895 (2001) (dismissing claim under I.C. § 19-2719(5)(b) because the evidence was "merely impeaching").

In his amended successive petition, Pizzuto expressly contends, "The result was that petitioner was deprived of crucial **impeachment evidence** regarding Mr. Rice who was the star witness against Mr. Pizzuto." (#34845, R., p.400) (emphasis added). Pizzuto further contends, "The undisclosed plea deal constitutes **material**

impeachment." (#34845, R., p.401) (emphasis added). Obviously, the "crucial impeachment evidence regarding Mr. Rice" involves the alleged "deal" made between him and the state, which is intricately intertwined with the other claims in Pizzuto's successive petition. However, because I.C. § 19-2719(5)(b) does not permit the filing of a successive post-conviction petition that merely alleges matters which are impeaching, Pizzuto, 134 Idaho at 797, Pizzuto's petition must be dismissed on appeal.

H. Pizzuto Has Failed To Establish I.C. § 19-2719 Violates Either The State Or Federal Constitutions

Pizzuto raises several constitutional challenges to I.C. § 19-2719, including: (1) denial of equal protection and due process; (2) vagueness; and (3) the improper "grafting" of the "reasonable time" limit for the filing of successive petitions. (Appellant's brief, pp.55-57.) Because these arguments have been repeatedly rejected by the Idaho Supreme Court, they are without merit.

1. Due Process And Equal Protection

Based upon the alleged "manifest injustice exception" of I.C. 19-4901(4), Pizzuto contends I.C. § 19-2719(5) violates his equal protection and due process rights. (Appellant's brief, pp.55-56.) In Beam, 115 Idaho at 211-13, the court expressly held I.C. § 19-2719 does not violate equal protection. In Rhoades, 120 Idaho at 806, the court expressly concluded I.C. § 19-2719 does not violate due process. The Idaho Supreme Court has repeatedly affirmed both of these cases. *See* Hairston, 144 Idaho at 55; Lankford, 127 Idaho at 102; State v. Hoffman, 123 Idaho 638, 647, 851 P.2d 934 (1993); State v. Card, 121 Idaho 425, 430-31, 825 P.2d 1081 (1991); State v. Rhoades, 121 Idaho 63, 72, 822 P.2d 960 (1991); State v. Paz, 118 Idaho 542, 559, 798 P.2d 1 (1990); State v.

Fetterly, 115 Idaho 231, 235-36, 766 P.2d 701 (1988). Because Pizzuto has failed to even cite these cases, he obviously has failed to provide any argument as to why they are not controlling or should be reconsidered.

2. Vagueness

Pizzuto contends I.C. § 19-2719(5) "imposes an internally inconsistent standard of 'known' or 'should reasonably have been known,' in subsection (5) versus a standard of reasonably 'could' have been known in subsection (5)(a)" making it "impossible to glean from the statute or case law regarding [the] 19-2719 waiver standard what 'should reasonably have been known' requires." (Appellant's brief, pp.56-57.) This argument has also been rejected by the Idaho Supreme Court in Hairston, 144 Idaho at 57. Because Pizzuto has failed to even cite Hairston, he obviously has failed to provide any argument as to why it is not controlling or should be reconsidered.

3. "Reasonable Time" Requirement

Pizzuto concedes his argument, that the "reasonable time" standard is unconstitutionally vague, was rejected in Pizzuto V, 2008 WL 466568, *6, but "incorporates herein the argument made in that case and urges reconsideration of the issue." (Appellant's brief, p.57.) Because Pizzuto has failed to explain, with argument and citation to authority, why this Court should reconsider an issue decided just last year, his claims fail. *See* State v. Creech, 132 Idaho 1, 19, 966 P.2d 1 (1998) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966 (1996)) (failure to cite proper authority to support an argument results in waiver of the issue).

II.

This Court Is Precluded From Addressing The Merits Of Pizzuto's Appeal Because Of His Failure To Provide A Statement Of The Issues In His Brief On Appeal

Should this Court decline to dismiss Pizzuto's appeal based upon his failure to pass the procedural hurdles of I.C. § 19-2719, the district judges' decisions must be affirmed because of his failure to comply with basic appellate rules of procedure.

Idaho Appellate Rule 35(a) governs the content of an appellant's brief and mandates that all appellant's briefs contain a short and concise list of the issues presented on appeal. In relevant part, the rule reads as follows:

> The brief of the appellant shall contain the following divisions under appropriate headings:
>
> . . . .
>
> > A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues shall be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

I.A.R. 35(a)(4).

"When an appellant fails to list the issues it wants this Court to address in a statement of issues in its brief, as required by I.A.R. 35(a)(4), we may decline to consider the issue." Lowder v. Minidoka County Joint School Dist., 132 Idaho 834, 840, 979 P.2d 1192 (1999); *see also* Kugler v. Drown, 119 Idaho 687, 691, 809 P.2d 1166 (Ct. App. 1991) (refusing to consider an issue which was argued in the body of the appellant's brief, but not set out in the statement of issues). Moreover, raising the issue in the

appellant's reply brief "does not cure the defect." Rowley v. Fuhrman, 133 Idaho 105, 108, 982 P.2d 940 (1999).

While the "rule will be relaxed when the issues are supported by argument in the briefs," Rhead v. Hartford Insurance Co. of the Midwest, 135 Idaho 446, 452, 19 P.3d 760 (2001), based upon the convoluted and vague nature of Pizzuto's arguments, he is not entitled to "relaxation" of the rule. Pizzuto's appellate attorney is a seasoned capital litigator who has filed hundreds of briefs with multiple appellate courts. However, instead of addressing the parameters of I.C. § 19-2719, which was the primary basis of the district judges' decisions, she spent the vast majority of the brief addressing the merits of Pizzuto's claims. Therefore, this Court should decline to address any of the arguments that are raised in Pizzuto's brief. Alternatively, should this Court "relax" I.A.R. 35(a)(4), Pizzuto's arguments should be very narrowly construed.

III.

Because Pizzuto Failed To Establish A Genuine Issue Of Material Fact Regarding His "Judicial Misconduct" Claim, It Fails On The Merits

A. Introduction

Apparently uniting his third and fourth claims from his amended successive petition, Pizzuto contends there are "unrefuted allegations that Judge Reinhardt expressed hostility toward Mr. Pizzuto, directed and orchestrated the plea negotiation and blood evidence investigation, and decided to impose the death penalty in advance of the sentencing hearing, [which] compel[s] the conclusion that Mr. Pizzuto was not tried by an impartial judge, in violation of due process." (Appellant's brief, p.21.)

Assuming Pizzuto overcomes the procedural bars associated with I.C. § 19-2719 and this Court "relaxes" the requirements of I.A.R. 35(a)(4), Pizzuto's claim fails because he has failed to raise a genuine issue of material fact.

B. Standard Of Review

In Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108 (2004) (quoting Saykhamchone v. State, 127 Idaho 319, 900 P.2d 795 (1995)), the supreme court reaffirmed the standard of review in post-conviction cases in which summary dismissal was granted by the trial court:

> In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if accepted as true. A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. The standard to be applied to a trial court's determination that no material issue of fact exists is the same type of determination as in a summary judgment proceeding. (citations omitted throughout).

C. The Claim Of Judicial Bias Based Upon Rawson's Affidavit Was Not Properly Pled In The Amended Successive Petition

Before addressing the merits of Pizzuto's arguments regarding judicial bias, it is necessary to review what was actually pled in his amended successive petition and whether the claim of judicial bias based upon Rawson's affidavit was pled in the petition.

Idaho Code § 19-4903, which governs the content of a post-conviction petition, states:

> **The application shall** identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, **specifically set forth the grounds upon which the application is based**, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in section 19-

> 4902. Affidavits, records, or other evidence **supporting its allegations** shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence. Argument, citations, and discussion of authorities are unnecessary.

(Emphasis added).

In Hayes v. State, 143 Idaho 88, 91, 137 P.3d 475 (Ct. App. 2006) (emphasis added), the Idaho Court of Appeals noted petitioners must prove, by a preponderance of evidence, the allegations upon which a request for relief is based, and then explained:

> This proof must **begin with the petition itself**. The petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting **its allegations** must be attached, or the petition must state why such **supporting evidence** is not included. I.C. § 19-4903. In other words, the petition must present or be accompanied by admissible evidence supporting **its allegations**, or it will be subject to dismissal.

Discussing I.C. § 19-4903, the Idaho Supreme Court has explained, "An application for post-conviction relief differs from a complaint in an ordinary civil action. **The application must contain much more than a short and plain statement of the claim** that would suffice for a complaint under I.R.C.P. 8(a)(1)." Dunlap, 141 Idaho 50, 56, 106 P.3d 376 (2004) (internal quotes and citations omitted) (emphasis added).

The court of appeals has also concluded:

> We have often observed that I.C. § 19-4903 requires that **an application for post-conviction relief contain more than a 'short and plain statement of the claim' that would suffice for a complaint under I.R.C.P. 8(a)(1).** An application for post-conviction relief is required to be verified with respect to the facts within the personal knowledge of the applicant, and affidavits, records or other evidence **supporting its allegations** must be attached, or the application must state why the supporting evidence is absent.

Anderson v. State, 133 Idaho 788, 792, 992 P.2d 783 (Ct. App. 1999) (emphasis added); *see also* Small v. State, 132 Idaho 327, 330-31, 971 P.2d 1151 (Ct. App. 1998).

Based upon I.C. § 19-4903 and its interpretive case law, the petition itself must set forth the claims, while affidavits are filed to merely support the claims, not raise new or additional claims that are not contained within the petition itself. *See* Row, 135 Idaho at 579 ("In this case, the petition listed various issues that Row desired to raise regarding the effectiveness of her appellate counsel, but it did not include, nor was it accompanied by, sworn statements setting forth the material facts supporting those issues").

Pizzuto's "GROUNDS FOR RELIEF" commence on page six of his amended successive petition, beginning with a recitation of "FACTS." (#34845, R., p.391.) The only reference to Rawson or her affidavit is on page fourteen of the amended petition and refers only to the ownership of a shirt and belt admitted at Pizzuto's trial; no reference is made to the alleged dinner or an allegation stemming from the alleged events at the dinner. Pizzuto's "CLAIMS" commence on page fifteen of his amended petition, beginning with the allegation that the state withheld exculpatory information based upon the alleged "twenty-year deal" with Rice. (#34845, R., pp.400-01.) Pizzuto's second claim raises "prosecutorial misconduct" based upon the alleged "twenty-year-deal" with Rice and the alleged introduction of false blood evidence found in the cabin and on Pizzuto's clothing. (#34845, R., p.401.) In Pizzuto's third claim, he raises "judicial misconduct," based exclusively upon four allegations: (1) Judge Reinhardt's participation in "off the record plea negotiations with Mr. Rice's defense counsel;" (2) creation of a guilty plea record that was "deliberately misleading about the deal Mr. Rice was to receive;" (3) standing by "while the prosecutor used deliberately false testimony to

convict Mr. Pizzuto;" and (4) engaging in ex parte contact with jurors during and following their verdict, but before sentencing. (#34845, R., p.402.) There is no mention of Rawson or an allegation of judicial misconduct based upon the alleged dinner events. In his fourth claim, Pizzuto raises a due process claim based upon Judge Reinhardt's "continued assignment of this case and its related postconviction proceedings. (#34845, R., pp.402-03.) His fifth claim raises cumulative error. (#34845, R., p.403.) Pizzuto's final claim is "actual innocence," based upon: (1) Rice's testimony not being credible because of the alleged "twenty-year deal;" (2) Odom being a paid informant; and (3) the state allegedly producing false blood evidence. (#34845, R., pp.403-04.)

While there is a reference to Rawson's affidavit as one of several "SUPPORTING AFFIDAVITS DOCUMENTATION" (#34845, R., p.404), there is no other reference to Rawson or judicial misconduct associated with the alleged dinner.

Pizzuto contended he filed his amended petition based upon the following:

> (1) to correct factual mis-statement in the petition;
>
> (2) to incorporate recently discovered evidence as a result of the continuing investigation;
>
> (3) to more fully and clearly set forth the factual and legal grounds upon which Petitioner seeks relief and its full and complete presentation of every claim now known to Petitioner not previously presented to this Court.

(#34845, R., pp.369-70.)

While Pizzuto clearly stated the amended petition was designed to "fully and clearly set forth the factual and legal grounds upon which Petitioner seeks relief and its full and complete presentation of every claim now known to Petitioner not previously presented to this Court" (#34845, R., p.370), there is no further reference in the amended

petition to Rawson or the alleged dinner, demonstrating Pizzuto did not intend to raise such a claim. Pizzuto's claim of judicial misconduct is only predicated upon the three factual allegations described above and asserted in his amended petition.

While the courts are permitted to give a liberal reading to *pro se* petitions, Griffin v. State, 142 Idaho 438, 441, 128 P.3d 975 (Ct. App. 2006), Pizzuto's sixth post-conviction petition was drafted by an experienced attorney who specializes in capital litigation defense. When experienced counsel drafts pleadings and briefs, the courts are not permitted to "give them a broad, non-technical interpretation." Wilson v. State, 113 Idaho 563, 565, 746 P.2d 1022 (Ct. App. 1987).

Despite these basis principles and the content of Pizzuto's amended petition, Judge Williamson concluded a claim of judicial misconduct, based upon the alleged dinner events, was properly pled. (#34845, R., pp.512-13.) Judge Williamson's conclusion is particularly troubling because it is based upon non-existent facts. Examining Rawson's affidavit, Judge Williamson concluded, "Angelina Pizzuto (n/k/a Rawson) has testified that, while serving as a State's witness, she went to dinner **during the trial – and before sentencing** – with Mr. Boomer, Sheriff Baldwin, and Judge Reinhardt." (#34845, R., p.512) (emphasis added.) However, Rawson's affidavit does not support this conclusion. The entirety of Rawson's allegation regarding Judge Reinhardt's alleged statement reads as follows:

> 11. I remember **one night** when I went out to dinner with Mr. Boomer, Sheriff Baldwin, and Judge Reinhardt at the restaurant/bar next to the motel where I was staying. The group of us had T-bone steaks and drinks. We were all having a good time and talking about the case. At the end of dinner, Judge Reinhardt said something to the whole group about how he was going to "hang" my brother Jerry. The other men heard this and all agreed. I recall this part clearly because it upset me. Judge

> Reinhardt left soon after, while the rest of us went from the dining room into the bar for a few more drinks.

(#34845, R., p.293) (emphasis added).

Outside of the reference to "one night," there is no indication when Judge Reinhardt's statement was allegedly made: pretrial, during trial, post-trial but prior to sentencing, during sentencing or even post-sentencing. For this reason, it was imperative that Pizzuto be required to comply with the pleading requirements in post-conviction cases and not rely upon a claim cobbled together from a supporting affidavit that is not raised in the petition. Permitting Pizzuto to raise a claim contained only in a supporting affidavit defies the heightened pleading requirement required in post-conviction cases, which requires "much more than a short and plain statement of the claim." Dunlap, 141 Idaho at 56. The state should be able to rely upon the petition itself to ascertain the allegations being raised in a post-conviction case and not be required to scour affidavits for claims, particularly when affidavits are filed only to support the allegations raised in the petition and are insufficient to meet the pleading requirements of I.C. § 19-4903.

Because the allegations made in Rawson's affidavit were not properly pled claims in Pizzuto's amended successive petition, they may not be considered by this Court.[12]

D. Standards Of Law Regarding An Impartial Judge

In Pizzuto I, 119 Idaho at 776 (internal quotations and citations omitted), the Idaho Supreme Court discussed the standards associated with having an impartial judge:

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[12] Should this Court conclude the claim stemming from Rawson's affidavit was properly pled in Pizzuto's amended successive petition and he has overcome the procedural bars of I.C. § 19-2719 and I.A.R. 35(a)(4), an evidentiary hearing may be required on this portion of his judicial misconduct claim.

> It has been held that the right to due process requires an impartial trial judge. However, a judge may not be disqualified for prejudice unless it is shown that the prejudice is directed against the party and is of such nature and character as would render it improbable that under the circumstances the party could have a fair and impartial trial. In order to constitute legal bias or prejudice, allegations of prejudice in post-conviction and sentence reduction proceedings must state facts that do more than simply explain the course of events involved in a criminal trial. In Idaho a judge cannot be disqualified for actual prejudice unless it is shown that the prejudice is directed against the litigant and is of such a nature and character that it would make it impossible for the litigant to get a fair trial. Whether the judge's involvement in the defendant's case reaches the point where disqualification from further participation in a case becomes necessary is left to the sound discretion of the trial judge.

E. Pizzuto Has Failed To Raise A Genuine Issue Of Material Fact Regarding "Judicial Misconduct"

Pizzuto's claims regarding judicial bias and misconduct, as pled in his amended successive petition, are primarily based upon the contention that Judge Reinhardt actually knew there was an agreement as to the length of Rice's sentence. While there may be evidence supporting the allegation that Rice's attorneys met with Judge Reinhardt and the prosecutor to discuss a reduced charge, there is no evidence supporting the allegation Judge Reinhardt entered into a conspiracy with Rice's attorneys or the prosecutor to withhold evidence regarding an actual sentence.

Rice's attorney's notes reflect that on January 16, 1986, the attorneys met with the prosecutor and Judge Reinhardt. (#34845, R., p.42.) However, the notes reflect only that Rice would enter a guilty plea to second-degree murder and do not reference any kind of sentencing agreement. (Id.) Even Rice's affidavit merely states, "My attorneys, William Dee and Wayne MacGregor, told me that they worked it out with the prosecutor that if I pled guilty, I would get a sentence of twenty years concurrent on each count." (#34845, R., p.31.) The only reference to Judge Reinhardt is that his attorneys "talked about their

close relationships with the prosecuting attorney and judge and they assured me that I could rely on their representations." (#34845, R., p.32.) There is simply no reference that Rice's attorneys had a "deal" with Judge Reinhardt regarding the length of Rice's sentence. Neither are there any affidavits from Pizzuto's two trial attorneys, the prosecutor or Judge Reinhardt.

Even if Judge Reinhardt "participated in off the record plea negotiations with Mr. Rice's defense counsel" (#34845, R., p.402), it does not establish judicial misconduct. Further, while ex parte contact with jurors is strongly discouraged, *see* Gillingham Construction, Inc. V. Newby-Wiggins Construction, Inc., 142 Idaho 14, 25, 121 P.2d 946 (2005), it does not constitute judicial bias. Simply stated, Pizzuto failed to support this claim with sufficient material facts establishing bias on the part of Judge Reinhardt.

IV.

Because Pizzuto Failed To Establish A Genuine Issue Of Material Fact Regarding His "Prosecutorial Misconduct" Claim, It Fails On The Merits

A. Introduction

Apparently uniting his first two claims from his amended successive petition, Pizzuto contends the prosecutor withheld exculpatory evidence by not disclosing the alleged "deal" with Rice, and then failed to correct Rice's allegedly false testimony that there was no plea agreement. (Appellant's brief, pp.24-29.)

Assuming Pizzuto overcomes the procedural bars associated with I.C. § 19-2719 and this Court "relaxes" the requirements of I.A.R. 35(a)(4), Pizzuto's claim fails because he has failed to raise a genuine issue of material fact.

B. Standard Of Review

The proper standard of review is discussed in section III(B) above.

C. Standards Of Law Regarding The Withholding Of Exculpatory Evidence And The Correction Of False Testimony By The Prosecutor

Under Brady, 373 U.S. at 87, and its progeny, the prosecution has a duty to disclose evidence that is both favorable to the defense and material to either guilt or punishment. The suppression of such evidence violates due process. Id. at 86-87. To prove a Brady violation, Pizzuto must show three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The Court discussed the issue of prejudice or materiality in Kyles v. Whitley, 514 U.S. 419, 434 (1995):

> *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." [Citation omitted].

In Kyles, 514 U.S. at 434-36, the Court reiterated, once a reviewing court has found a constitutional violation applying the materiality test from United States v. Bagley, 473 U.S. 667, 682 (1985), there is no need for further harmless error analysis. The Court also explained that in assessing materiality, the withheld evidence is viewed collectively, "not item-by-item." Id. at 436-38.

In Napue v. Illinois, 360 U.S. 264 (1959), the Supreme Court explained the state cannot obtain a conviction through the use of evidence known to the state to be false. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. at 269. Materiality is based upon "'the well-established rule that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood* that the false testimony *could have affected* the judgment of the jury.'" Sivak, 134 Idaho at 649 (emphasis in original) (quoting Bagley, 473 U.S. at 678). "This standard is a 'strict standard of materiality not just because [these cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.'" Paradis v. State, 110 Idaho 534, 538, 716 P.2d 1306 (1986) (quoting United States v. Agurs, 427 U.S. 97, 104 (1976)).

D. Pizzuto Has Failed To Raise A Genuine Issue Of Material Fact Regarding "Prosecutorial Misconduct"

While evidence of an alleged "deal" with Rice could be used as impeachment evidence, based upon the evidence presented to the jury, it is nothing more than cumulative impeachment evidence and therefore fails. Morris v. Ylst, 447 F.3d 735, 740-41 (9th Cir. 2006); Swan v. Peterson, 6 F.3d 1373, 1384 (9th Cir. 1993); United States v. Marashi, 913 F.2d 724, 732 (9th Cir. 1990).

Moreover, Pizzuto has failed to establish either, that the alleged deal was sufficient to undermine confidence in the outcome, or any reasonable likelihood that Rice's allegedly false testimony could have affected the judgment of the jury. The jury was repeatedly told Rice was given a deal whereby he pled guilty to the lesser offense of

second-degree murder. (#16489, Tr., pp.1775-76, 1880-85.) Rice was also questioned regarding his drug use with Odom and their relationship. (#16489, Tr., pp.1778-83.) Rice was required to answer questions regarding his extensive prior criminal history including robbery, receiving stolen property and burglary. (#16489, Tr., pp.1794-99.) Throughout his testimony, Rice was impeached with prior inconsistent statements and acknowledged he had not told the truth. (#16489, Tr., pp.1766-74, 1813-17, 1874-75.)

Pizzuto's claim is even more benign than the claim in Sivak, 134 Idaho at 646-649, where the petitioner contended the state had allegedly withheld an agreement with a jailhouse informant who testified at the petitioner's trial. The supreme court concluded the evidence was "cumulative with evidence already within the possession of the defense at the time when Sivak filed his first petition for post-conviction relief." Id. at 648-49.

Clearly, even if a deal existed with Rice that was not disclosed, it was nothing more than cumulative impeachment evidence, and there is no reasonable likelihood it could have affected the judgment of the jury. Therefore, Pizzuto's failure to raise a genuine issue of material fact required the dismissal of this claim.

V.

Because Pizzuto Failed To Establish A Genuine Issue Of Material Fact Regarding His "Actual Innocence" Claim, It Fails On The Merits

The exact basis of Pizzuto's argument on appeal is somewhat of a mystery. The state is unable to determine whether Pizzuto is contending actual innocence permits him to circumvent I.C. § 19-2719 or he is raising a free-standing actual innocence claim. (Appellant's brief, pp.44-45.) Irrespective, assuming Pizzuto overcomes the procedural

bars associated with I.C. § 19-2719 and this Court "relaxes" the requirements of I.A.R. 35(a)(4), Pizzuto's claim fails.

While there is no question that a claim of actual innocence provides a gateway for federal habeas petitions to overcome procedural default, House v. Bell, 547 U.S. 518, 538-39 (2006), I.C. § 19-2719 does not provide the same gateway. Rather, as explained above, the only exception permitting the filing of a successive post-conviction petition in a capital case is "where the petitioner can demonstrate that the issues raised were not known or could not reasonably have been known within the 42-day time frame." McKinney, 133 Idaho at 700-01.

To the extent Pizzuto is raising a free-standing actual innocence claim and such a claim is cognizable in post-conviction proceedings, it must be rejected. Pizzuto's claim of actual innocence is basically premised upon his contention regarding the alleged deal with Rice, which is nothing more than cumulative impeachment evidence, a claim regarding Odom that has already been rejected by the Idaho Supreme Court, and an allegation regarding false blood evidence that was presented and rejected by the jury. (#34845, R., p.403.) Even if I.C. § 19-2719 permitted the filing of a successive post-conviction petition based upon "actual innocence," the claim is not supported by genuine issues of material facts. In light of the overwhelming evidence of his guilt, even if the three allegations are true, they do not establish Pizzuto's actual innocence.

VI.

Because Pizzuto Failed To Establish A Genuine Issue Of Material Fact Regarding His "Cumulative Error" Claim, It Also Fails On The Merits

Finally, Pizzuto contends, "The cumulative effect of the constitutional errors in this case denied Mr. Pizzuto a fair trial. (Appellant's brief, p.58.) Assuming Pizzuto overcomes the procedural bars associated with I.C. § 19-2719 and this Court "relaxes" the requirements of I.A.R. 35(a)(4), Pizzuto's claim fails because he has failed to raise a genuine issue of material fact.

Before this Court can find cumulative error, it must first find error. "When there is an 'accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial,' the cumulative error doctrine requires a reversal of the conviction as the trial has contravened the defendant's right to due process." State v. Payne, 145 Idaho 548, ---, 199 P.3d 123, 143 (2008) (quoting State v. Moore, 131 Idaho 814, 823, 965 P.2d 174 (1998)). Because Pizzuto has failed to demonstrate error, let alone an aggregate of harmless errors, this Court cannot reverse based on the cumulative error doctrine.

VII.

Pizzuto Has Failed To Establish Judge Owen Abused His Discretion When He Reconsidered Judge Williamson's Decision And Dismissed Pizzuto's Remaining Claim

A. Introduction

Pizzuto contends Judge Owen abused his discretion by granting the state's Motion to Reconsider and dismissing Pizzuto's remaining claim because the state allegedly offered no new evidence to support its motion. (Appellant's brief, pp.33-35.) Because

the party requesting reconsideration of an interlocutory order is not required to present new evidence, Pizzuto's argument is without merit.

B. Standard Of Review

"The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." Campbell v. Reagan, 144 Idaho 254, 258, 159 P.3d 891 (2007).

C. Legal Framework For Reconsideration Of An Interlocutory Order

The Idaho Rules of Civil Procedure permit the filing of "[a] motion for reconsideration of any interlocutory orders of the trial court . . . at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment." I.R.C.P. 11(a)(2)(B). "I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate interlocutory orders so long as final judgment has not been entered." Elliott v. Darwin Neibaur Farms, 138 Idaho 774, 785, 69 P.3d 1035 (2003). A successor judge is permitted, under I.R.C.P. 11(a)(2)(B), to reconsider the rulings of a prior judge. Farmers National Bank v. Shirey, 126 Idaho 63, 68, 878 P.2d 762 (1994). "Generally, post-conviction applications are governed by the Idaho Rules of Civil Procedure." Dunlap v. State, 141 Idaho 50, 57, 106 P.3d 376 (2004).

D. Judge Owen Did Not Abuse His Discretion

Pizzuto's contention that the party requesting reconsideration of an interlocutory order must present new evidence is without merit. In Johnson v. Lambros, 143 Idaho 468, 472, 147 P.3d 100 (Ct. App. 2006) (emphasis in original), after reviewing several prior cases, the court of appeals concluded:

> Although there is language in some appellate opinions that could be construed to support Lambros's argument, we disagree with his characterization of the requirements for such a motion. In our view, the case law applying Rule 11(a)(2)(B) *permits* a party to present new evidence when a motion is brought under that rule, but does not *require* that the motion be accompanied by new evidence.

Because the state was not required to present new evidence or argument, Pizzuto has failed to establish Judge Owen abused his discretion.[13]

VIII.

Pizzuto Has Failed To Establish The District Court Abused Its Discretion By Denying His Request For Depositions

A. Introduction

Contending he was entitled to "obtain and thoroughly review all records and files pertaining to the defendant" and that his search for exculpatory evidence overrides the prohibitions associated with I.C.R. 57(b), Pizzuto contends the district court abused its discretion by denying his request to depose the following: (1) Judge Reinhardt; (2) former Idaho County Prosecutor Henry Boomer; (3) former Idaho County Sheriff Randy Baldwin; (4) Odom's former attorney, Greg FitzMaurice; (5) Rice's former attorney, Wayne MacGregor; (6) former Idaho County Prosecutor Jeff Payne; and (7), Pizzuto's former co-counsel, Scott Wayman. (Appellant's brief, pp.35-40.)

Assuming Pizzuto overcomes the procedural bars associated with I.C. § 19-2719 and this Court "relaxes" the requirements of I.A.R. 35(a)(4), because the pivotal issue was whether he knew or should have known of the successive post-conviction claims, he

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[13] Moreover, even if the state were required to present new evidence, the information regarding Judge Williamson's recusal based upon Judge Reinhardt having presided over a lawsuit in which she was a party was certainly sufficient "new evidence" to warrant reconsideration.

has failed to demonstrate the district court abused its discretion by refusing to order all the requested depositions, particularly where the court authorized the use of four interrogatories and the depositions of Boomer and Baldwin.

B. Standard Of Review

Discovery in post-conviction relief proceedings is a matter left to the discretion of the district court and will be reversed only upon a showing of an abuse of that discretion. Fairchild v. State, 128 Idaho 311, 319, 912 P.2d 679 (Ct. App. 1996).

C. Pizzuto Has Failed To Establish The District Court Abused Its Discretion By Denying His Request For Depositions

On May 8, 2006, Pizzuto filed a Motion for Leave to Conduct Discovery requesting that he be permitted to depose the individuals listed above, except for Baldwin. (#34845, R., pp.376-81.) Relying upon I.C.R. 57(b), the district court denied Pizzuto's motion for depositions, but permitted him to submit "no more than four interrogatory questions each to Hank Boomer and Randy Baldwin, who Rawson alleges to have been present at dinner when the alleged statement was made." (#34845, R., pp.20-21.) Pizzuto responded to the court's order by filing a Notice of Intent not to Submit Interrogatories and Renewed Request for Depositions, not only declining the court's offer to submit the four interrogatories, but also requesting for the first time to depose Baldwin. (#34845, R., pp.529-32.) Addressing Pizzuto's motion, the court concluded it would permit the depositions of Boomer and Baldwin, limited to the alleged dinner conversation. (#34845, R., pp.538-39.) Although a subpoena was issued for Boomer's deposition (#34845, R., pp.546A-B), the record does not establish either deposition was completed.

While post-conviction cases are civil in nature, State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548 (1983), the rules of discovery contained in Idaho's rules of civil procedure do not apply in post-conviction cases. I.C.R. 57(b). "When an applicant believes discovery is necessary for acquisition of evidence to support a claim for post-conviction relief, the applicant must obtain authorization from the court to conduct discovery." Murphy v. State, 143 Idaho 139, 148, 139 P.3d 741 (Idaho Ct. App. 2006). "Unless discovery is necessary to protect an applicant's substantial rights, the district court is not required to order discovery." Raudebaugh v. State, 135 Idaho 602, 605, 21 P.3d 924 (2001). In Raudebaugh, the petitioner made conclusory statements about what an expert and investigator might have testified to at trial but did not point to specific facts. Id. The Idaho Supreme Court affirmed the district court's denial of discovery because "Raudebaugh's allegations only argue what the experts might have testified to had trial counsel employed them. Raudebaugh's allegations are speculative." Id.

In Aeschilman v. State, 132 Idaho 397, 754, 973 P.2d 749 (Ct. App. 1999), the court of appeals denied post-conviction discovery because the applicant failed to "identify the type of information that he or she may obtain through discovery that could affect the disposition of his or her application for post-conviction relief." *See also* LePage v. State, 138 Idaho 803, 810, 69 P.32d 1064 (Ct. App. 2003) ("In order to be granted discovery, a post-conviction applicant must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application").

Based upon the procedural posture of Pizzuto's case at the time he requested discovery, he was not entitled to, nor should the district court have permitted him to

depose the individuals requested in his motion. The issue before the court was whether Pizzuto could overcome the procedural bars imposed by I.C. § 19-2719. Pizzuto was first required to establish the claims in his successive petition were not known or reasonably could not have been known when he filed his first post-conviction petition, his claims were not facially insufficient because they alleged matters that were merely cumulative or impeaching, and that they were timely. Because the district court concluded he failed to meet those preliminary burdens, Pizzuto has failed to establish an abuse of discretion.

Pizzuto's reliance upon Brady and its progeny is also misplaced. First, Brady requires the disclosure of only exculpatory evidence. Pizzuto has not made any showing the state withheld exculpatory evidence other than allege the state withheld information regarding Rice's alleged plea agreement. Rather, his Brady argument is a precursor to embarking on a fishing expedition. As explained in United States v. Piers, 2005 WL 2122126, *2 (D. Alaska 2005) (quoting United States v. Bagley, 473 U.S. 667, 675, n.7 (quoting Giles v. Maryland, 386 U.S. 66 (1967))), "*Brady* does not create a discovery rule. 'An interpretation of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present system of criminal justice.'"

Relying upon the steady beat of "death is different," Pizzuto also contends he should have been granted discovery based upon "heightened procedural safeguards" in capital cases. While the courts have applied such safeguards in limited situations, Pizzuto has provided no authority applying those safeguards to discovery issues in collateral or post-conviction cases. In Fields, 135 Idaho at 292, the Idaho Supreme Court expressly applied I.C.R. 57 to a capital case, explaining:

> Discovery during post-conviction relief proceedings is a matter put to the sound discretion of the district court. I.C.R. 57(b). The discovery provisions in the civil rules, which generally apply to proceedings on an application for post-conviction relief, are not applicable unless so ordered by the district court. *Griffith v.* State, 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992). There is no requirement that the district court order discovery, unless discovery is necessary to protect an applicant's substantial rights. *Id.*

Moreover, in State v. Wood, 132 Idaho 88, 108, 967 P.2d 702 (1998), the supreme court discussed when a post-conviction petitioner may take the deposition of the trial judge, "The question then is whether there were facts not in the record that were relevant to the post-conviction review proceedings and were not otherwise available to Wood." Because the information Pizzuto sought from Judge Reinhardt was available from other sources, specifically, Boomer, Baldwin and Rawson, the district court properly denied the request to depose Judge Reinhardt.

Rather than requesting discovery that was necessary to protect his substantial rights, Pizzuto's request constituted a "fishing expedition,' which is not permitted because post-conviction cases are "not a vehicle for unrestrained testimony or retesting of physical evidence introduced at the criminal trial." Murphy, 143 Idaho at 148.

IX.

Pizzuto Has Failed To Establish The District Court Abused Its Discretion By Denying His Motion To File Additional Affidavits Because They Were Inadmissible

A. Introduction

Pizzuto contends the district court abused its discretion by striking documents Z-6 through Z-15 and the Affidavit of Ronald D. Howen because they "were relevant and admissible for the consideration of the claims made." (Appellant's brief, pp.40-44.)

First, Pizzuto is incorrect that all of the documents were "stricken" from the record. The district court's order clearly delineates that only documents Z-6 through Z-8, Z-10, Z-12, Z-15, and the Affidavit of Ronald D. Howen were "stricken." (#34845, R., p.518.) Second, assuming Pizzuto overcomes the procedural bars associated with I.C. § 19-2719 and this Court "relaxes" the requirements of I.A.R. 35(a)(4), because the documents did not contain relevant information regarding whether he could overcome the procedural hurdles of I.C. § 19-2719 and violate Idaho rules of evidence, he has failed to establish the district court abused its discretion.

B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been an abuse of that discretion. State v. Howard, 135 Idaho 727, 731-32, 24 P.3d 44 (2001); State v. Zimmerman, 121 Idaho 971, 974, 829 P.2d 861 (1992).

C. Pizzuto Has Failed To Establish The District Court Abused Its Discretion By Denying His Request To File Certain Affidavits And Declarations

On May 8, 2006, Pizzuto filed a Motion for Leave to File Additional Affidavits (#34845, R., pp.374-75), which included appendices Z-6 through Z-15 (#34845, R., p.672, referencing exhibit 10). Howen's affidavit, attached to a Notice of Lodging, was not filed until May 23, 2006. (#34845, R., pp.482-84.) Addressing Pizzuto's motion, the district court concluded his motion would not be granted with respect to documents Z-8 through Z-10, Z-12, Z-15 and the Affidavit of Ronald D. Howen because they did not contain admissible evidence, but were either irrelevant and/or contained inadmissible hearsay. (#34845, R., pp.516-18.)

There is no question a post-conviction petition must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition. Hayes v. State, 143 Idaho 88, 137 P.3d 475, 91 (Ct. App. 2006) (citing I.C. § 19-4903). "In other words, the petition must present or be accompanied by **admissible** evidence supporting its allegations, or it will be subject to dismissal." Id. (emphasis added.)

The district court properly exercised its discretion by not admitting the documents because they contained information that was not admissible under the Idaho Rules of Evidence. For example, Appendix Z-7 discusses an interview by Brenda Bentley of Ron Howen, which is nothing but statements Howen allegedly made to Bentley. (#34845, R., p.672, exhibit 10, Appendix Z-7.) The contents of the affidavit clearly contain inadmissible hearsay in violation of I.R.E. 802. The same is true with Appendix Z-8, which contains nothing but statements Karen Talbot Kloer allegedly made to Bentley. (#34845, p.372, exhibit 10, Appendix Z-8.)

The affidavits contained in appendices Z-6, Z-10, Z-12, and Z-15 (#34845, R., p.372, exhibit 10), and the Affidavit of Ronald D. Howen (#34845, R., pp.484-87) were not admitted because they are irrelevant (#34845, R., p.518). Not only are they irrelevant to the issue before the court - whether Pizzuto's claims could withstand the procedural hurdles of I.C. § 19-2719 - they also contain irrelevant information regarding the merits of the claims under I.R.E. 404(b) because they contain inadmissible evidence of other crimes, wrongs or acts "to prove the character of a person to show action in conformity therewith." State v. Grist, --- Idaho ---, 2009 WL 198963, *2 (2009).

Because the issue before the district court was not "the claims made," but whether the claims could withstand the procedural hurdles of I.C. § 19-2719, and because consideration of the documents violated the Idaho Rules of Evidence, Pizzuto has failed to establish the district court abused its discretion by rejecting the documents.

CONCLUSION

The state respectfully requests that Pizzuto's appeal be dismissed or, alternatively, that the decisions of the district court be affirmed on appeal.

DATED this 30th day of March, 2009.

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 30th day of March, 2009, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Joan M. Fisher
Federal Defenders for the
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814

X U.S. Mail
____ Hand Delivery
____ Overnight Mail
____ Facsimile
____ Electronic Court Filing

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

APPENDIX A

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent, v. GERALD ROSS PIZZUTO, JR., Defendant-Appellant.	)	ORDER GRANTING MOTION TO DISMISS APPEAL Nos. 32677/32678 Ref. No. 06S-043

A MOTION TO DISMISS APPEAL and BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS APPEAL was filed by Respondent October 10, 2006. A BRIEF IN OPPOSITION TO STATE'S MOTION TO DISMISS APPEAL was filed by Appellant November 27, 2006. Thereafter, an AMENDED CERTIFICATE OF SERVICE of Appellant's Brief in Opposition to State's Motion to Dismiss Appeal was filed by Appellant November 30, 2006. A REPLY BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS with attachment was filed by Respondent December 1, 2006. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent's MOTION TO DISMISS APPEAL be, and hereby is, GRANTED and this appeal is DISMISSED.

DATED this 28th day of December 2006.

By Order of the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record

Entered on ATS

By: